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No.

In The
Supreme Court of the United States
October Term, 1982

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CORNELIA DEROIN YELLOWFISH, STELLA DEROIN ROWE, WILLENE DEROIN ROSS, CLARICE DEROIN RICKMAN, WILMA DEROIN GUOLADDLE, PEARL H. DEROIN MCKINNEY, LILLIAN CARSON MORGAN, LENA SHADOW BLACK, LOUIS (LEWIS) PETERS,

Petitioners,

vs.

CITY OF STILLWATER, OKLAHOMA, AND THE
UNITED STATES OF AMERICA,

Respondents.

—O—

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

—O—

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February, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether 25 U. S. C. § 357 which authorizes the condemnation of Indian trust allotments has been partially displaced by 25 U. S. C. §§ 323-328 which authorizes the Secretary of the Interior and Indian landowners to consent to right-of-ways across trust allotments.

2. Whether the United States, by taking the position in this case that 25 U. S. C. § 357 is not partially displaced by 25 U. S. C. § 323-328, acted outside the scope of its trust duties to the Indian allottees, and breached its trust responsibilities.

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CORNELIA DEROIN YELLOWFISH, STELLA DEROIN ROWE, WILLENE DEROIN ROSS, CLARICE DEROIN RICKMAN, WILMA DEROIN GUOLADDLE, PEARL H. DEROIN MCKINNEY, LILLIAN CARSON MORGAN, LENA SHADOW BLACK, LOUIS (LEWIS) PETERS,

Petitioners,

vs.

CITY OF STILLWATER, OKLAHOMA, AND THE
UNITED STATES OF AMERICA,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Petitioners Yellowfish, et al. respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 28, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 691 F.2d 926 (10th Cir. 1982) and

is reproduced as Appendix A, App. 1-36. The order of the Court of Appeals for the Tenth Circuit denying a petition for rehearing and suggestion for rehearing in banc is reproduced as Appendix B, App. 37-38. The opinion of the District Court is unreported and is reproduced as Appendix C, App. 39-43.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 28, 1982. A petition for rehearing and suggestion for rehearing in banc was filed on May 7, 1982. The decision of the Court of Appeals denying the petition was entered on November 12, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 25 U.S.C. § 357, 2d and last paragraph of section 3 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1084:

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

2. 25 U.S.C. §§ 323-328, the Act of February 5, 1948, §§ 1-6, 62 Stat. 17 (§ 7 of the Act was not codified):

§ 323 (§ 1 of the Act). Rights-of-way for all purposes across any Indian lands

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes,

communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

§ 324 (§ 2 of the Act). Same; consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479, of this title; section 473a of this title and sections 358a and 362 of Title 48; and sections 501-509 of this title, shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

§ 325 (§ 3 of the Act). Same; payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall

be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

§ 326 (§ 4 of the Act). Same; laws unaffected

Sections 323-328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.

§ 327 (§ 5 of the Act). Same; application for grant by department or agency

Rights-of-way for the use of the United States may be granted under section 323-328 of this title upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

§ 328 (§ 6 of the Act). Same; rules and regulations

The Secretary of the Interior is authorized to prescribe any necessary regulations for the purpose of administering the provisions of Sections 323-327 of this title.

(§ 7 of the Act).

This Act shall not become operative until thirty days after its approval.



STATEMENT OF THE CASE

The nine Indian petitioners seek a decision by this Court reversing the decision of the Court of Appeals for the Tenth Circuit and holding that a 1901 statute (25 U. S. C. § 357) vesting federal courts with jurisdiction over actions brought under state law to condemn Indian trust allotments has been partially displaced by a 1948 Act (25 U. S. C. §§ 323-328) authorizing the Secretary of the Interior to grant right-of-ways across trust allotments

subject to whatever conditions he may impose and to the consent of the Indian allottees.¹

The respondent City of Stillwater, Oklahoma, filed a petition in federal district court to condemn a right-of-way over the trust allotments of the nine Indian petitioners and many other Indians in Noble County, Oklahoma, for the purpose of constructing a municipal water supply pipeline. The United States was joined as a defendant because the allotments sought to be condemned were held in trust pursuant to the General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.*, with the United States retaining legal title as trustee. Federal jurisdiction was predicated on section 3 of the Act of March 3, 1901, 25 U.S.C. § 357.

The Indian petitioners retained private counsel and filed a motion to dismiss for lack of subject matter jurisdiction on the ground that 25 U.S.C. § 357 had been displaced in part by 25 U.S.C. §§ 321-328 and thus right-of-ways over trust allotments could not be condemned under section 357. The United States maintained a neutral position on the motion. The district court issued an interlocutory order denying the motion, and certifying the order for appeal pursuant to 28 U.S.C. § 1292(b). Petitioners filed a petition for permission to appeal, and on July 27, 1981, the Court of Appeals for the Tenth Circuit granted the petition. Both the District Court and the Court of Appeals denied petitioners' motion for a stay of entry and possession pending appeal.

Although maintaining a neutral position in the district court on the issue of the continued applicability of 25 U.S.C. § 357 to right-of-ways, the United States on July 27, 1981 filed a brief in the Court of Appeals taking

¹25 U.S.C. § 324 sets out four instances when the Secretary may authorize a right-of-way without Indian consent.

the position that 25 U.S.C. § 357 had not been partially displaced by 25 U.S.C. §§ 323-328. During argument that same day on the petition for leave to appeal, the Court of Appeals questioned the United States attorney concerning the appropriateness of the position assumed by the United States in behalf of the Indian allottees it represented. On August 18, 1981, petitioners filed a motion requesting the Court of Appeals to consider whether the United States was adequately representing its Indian wards and clients in accordance with its trust obligations, and standards of due process. On August 25, 1981 the Court of Appeals ordered the United States to respond to petitioners' motion. On September 16, 1981, the United States served its response stating that its decision to support the continuing validity of 25 U.S.C. § 357 was made in the best interests of the Indian allottees. Attached to the response was a copy of a letter dated September 15, 1981, which was sent to each allottee involved in the case advising them of the litigating position assumed by the United States in the Court of Appeals and advising them of their right to obtain private counsel if they so desired.

The United States ultimately filed two briefs on the merits in this case and argued orally twice asserting the position that 25 U.S.C. § 357 was not partially displaced by 25 U.S.C. §§ 323-328, and thus authorized the condemnation of rights-of-ways across Indian trust allotments. Hence, the two issues addressed by the Court of Appeals were: (1) whether federal court jurisdiction over this condemnation action is lacking because 25 U.S.C. § 357 was partially displaced by 25 U.S.C. §§ 323-328 insofar as the acquisition of right-of-ways is involved, and (2) whether the United States in its capacity as a trustee acted outside the scope of its authority or breached its trust

responsibilities in asserting the position that 25 U.S.C. § 357 was not partially displaced by 25 U.S.C. §§ 323-328.

The Court of Appeals for the Tenth Circuit held that 25 U.S.C. § 357 and 25 U.S.C. §§ 323-328 provide alternative means for a state-authorized condemnor to obtain a right-of-way over Indian allotted lands. The Court also held that in supporting section 357, the United States does not breach its trust to the Indians and is not required to make a showing that its position is in the Indians' best interest.

REASONS FOR GRANTING THE WRIT

1. This Court's review of the interrelationship between 25 U.S.C. § 357 and 25 U.S.C. §§ 323-328 is warranted to preserve to Indian allottees the full protections afforded them by 25 U.S.C. §§ 323-328, and to bring the federal administration of 25 U.S.C. § 357 and 25 U.S.C. §§ 323-328 into line with current congressional policies.

Several protective provisions of 25 U.S.C. §§ 323-328 would be rendered ineffective if right-of-ways could be obtained by condemnation pursuant to 25 U.S.C. § 357.² These provisions include the Secretary's powers to prescribe conditions, to determine just compensation, and to implement the Act through regulations; the allottees' right to withhold consent; and the Secretary's power to grant right-of-ways without the allottees' consent if he finds that the grant will cause no substantial injury to the land or any owner thereof.

²See, e. g., *Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna*, 542 F.2d 1375, 1379-1381 (10th Cir. 1976) ("The protection afforded by [25 U.S.C. §§] 311-328 would be nullified by the continued validity of [an act] which permits condemnation suits at any time for any public purpose without the consent of the Secretary or the Indians." *Id.* at 1381.

Likewise, the Secretary's extensive regulations published at 25 C.F.R. Part 169 would be rendered ineffective. Those regulations establish *inter alia*, standards of construction and maintenance for the safety and protection of allottees, 25 C.F.R. § 169.5, a method for establishing compensation and assessing damages, 25 C.F.R. § 169.13, and the manner of termination of such right-of-ways, 25 C.F.R. § 169.20. Special rules govern certain kinds of right-of-ways and track the requirements of the various special statutes applicable. See, 25 C.F.R. §§ 169.23-169.28.

Furthermore, the Tenth Circuit's decision that section 357 and 25 U.S.C. §§ 323-328 are alternative means of acquiring a right-of-way is inconsistent with the rule that statutes should be construed in a manner that effectuates current congressional policies. See, *Bryan v. Itasca County*, 425 U.S. 373, 386-87 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 477-79 (1976).

Section 357 was enacted as the second paragraph of Section 3 of the 1901 Indian Appropriations Act. 31 Stat. 1058, 1084. In 1901, prevailing federal Indian policy was manifested by the General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.* The objectives of the allotment policy "were to end tribal land ownership on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976). See also *Mattz v. Arnett*, 412 U.S. 481, 496 (1973); and Cohen, *Handbook of Federal Indian Law* 206-210 (1942). Allotted lands were to remain in trust for 25 years, 25 U.S.C. 348, after which "every allottee shall have the bene-

fit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U. S. C. 349.

When seen in context as part of the entire allotment program, 25 U. S. C. § 357 simply made one group of state laws, those governing condemnation proceedings, applicable to allotted lands several years prior to the expiration of the trust period. Hence, section 357 represents the assimilationist policy of the General Allotment Act era.

It is well-recognized that Congress, in 1934, concluded that the allotment policy had proven disastrous,³ and repudiated that policy by enacting the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.* (hereinafter IRA). *See, e. g., Mattz v. Arnett, supra*, at 496 n. 18; *Moe v. Confederated Salish & Kootenai Tribes, supra*, at 478-79; *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 151 (1973); *Stevens v. C.I.R.*, 452 F.2d 741, 748 (9th Cir. 1971). Several provisions of the IRA were designed to remedy the loss of Indian lands caused by the allotment policy. *See* 25 U. S. C. §§ 461, 462, 464, 465 and 477. Other provisions of the IRA were designed to afford Indians greater control over the administration of the trust imposed on their lands. *See, e. g.,* 25 U. S. C. § 476 (authorizing tribes to consent to the alienation of their lands or interests therein); *Morton v. Mancari*, 417 U. S. 535, 553 (1974).

25 U. S. C. §§ 323-328 embodies and furthers the policies of the IRA. This is most evident in 25 U. S. C. §§ 323 and 324. Section 323 charges the Secretary with the duty

³Between 1887 and 1934, the allotment process and the sale of so-called "surplus lands" had cut Indian land holdings from 138,000,000 to 48,000,000 acres. *See* Hearings on H. R. 7902, Committee on Indian Affairs, 73d Cong. 2d Sess. 15-18 (1934).

of imposing protective terms and conditions upon any right-of-way grant. And, section 324 requires the allottees' consent for right-of-ways over allotted lands except in specifically described circumstances when obtaining the consent of all those with interests in the allotment would be impractical or unfair.

Hence, the requirements of 25 U. S. C. §§ 323-328 and the implementing regulations are in keeping with the spirit of the IRA, to control the loss of Indian lands and to "turn over to the Indians a greater control of their own destinies." *Morton v. Mancari, supra*, at 553. Obviously the construction of two statutes in question in this case which effectuates current congressional policies is that which holds that 25 U. S. C. § 357 has been partially displaced by 25 U. S. C. §§ 323-328.

2. Review is appropriate in this case because the issue of the interrelationship between 357 and special right-of-way statutes has long been a troublesome one and has provoked numerous lawsuits in the federal courts, as well as a great deal of inconsistency in administrative interpretation.

The lower federal courts have had several occasions to rule on the issue of whether section 357 has been partially displaced by 25 U. S. C. §§ 323-328 or by other special right-of-way statutes. With one exception, they have construed 25 U. S. C. § 357 and 25 U. S. C. §§ 323-328 as providing alternative means of acquiring right-of-ways over allotments. *See, United States v. Minnesota*, 113 F. 2d 770 (8th Cir. 1940); *Nicodemus v. Washington Water Power Co.*, 264 F. 2d 614 (9th Cir. 1959); *Southern California Edison Co. v. Rice*, 685 F. 2d 354 (9th Cir. 1982); *petition for cert. filed* 51 U. S. L. W. 3443 (U. S. Nov. 24, 1982) (No. 82-873).

The one exception is the recent decision in *Nebraska Public Power District v. 100.95 Acres, etc.*, 540 F. Supp.

592 (D. Neb. 1982), appeal docketed, No. 82-2042-NE (8th Cir., Sept. 3, 1982). In that case, the district court held, *inter alia*, that section 357 is partially displaced by 25 U. S. C. §§ 323-328. That Court reasoned that the protections afforded to Indians by 25 U. S. C. §§ 323-328 would be nullified if condemnation under section 357 were an alternative means of obtaining a right-of-way across Indian allotments. *Id.* at 601-602. The Court distinguished *United States v. Minnesota*, *supra*, on the grounds that it had been decided before the enactment of 25 U. S. C. §§ 323-328. As noted, the decision is now pending on appeal in the Eighth Circuit.

The Interior and Justice Departments' administration of Section 357 and special rights-of-way statutes has not been consistent. At times, federal officials have taken a position favoring the construction of 25 U. S. C. § 357 and 25 U. S. C. §§ 323-328 or other special right-of-way statutes as alternative means of acquisition. *See, e. g.*, 49 I. D. 396 (1923), *Yellowfish v. City of Stillwater*, 691 F. 2d 926 (10th Cir. 1982). At other times, federal officials have taken a position in favor of the partial displacement of section 357 by sections 323-328, or other special right-of-way statutes. *See, e. g.*, *Minnesota v. United States*, 305 U. S. 382 (1939), especially the United States' Brief in Opposition to Certiorari at 7-8; Brief of the United States at 18-19,⁴ and Supplemental Memorandum for the United States at 7

⁴Solicitor General Robert H. Jackson, argued, *inter alia*, that applying the Section 357 condemnation procedure to high-way right-of-ways across allotted lands would render 25 U. S. C. § 311 "self-contradictory" and "largely inoperative." Brief in Opposition to Certiorari, *supra* at 8.

and 8. *Minnesota v. United States*, *supra*. See also, *United States v. Clarke*, 445 U.S. 253, 254 n.1 (1980).⁵

And, following the proceedings in *United States v. Clarke* in this Court, the Solicitor for the Department of Interior determined to maintain a "wait and see" attitude with respect to the issue raised in this case noting the various pending cases raising the issue. See, e.g., Memorandum from the Solicitor for the Department of the Interior to the Assistant Secretary for Land and Water, reproduced as Appendix D, App. 20-23.

This Court has in two previous cases been presented with the issue of the interrelationship between section 357 and a special right-of-way statute. In both cases, however, the Court rested its decision on other grounds and left open the interrelationship issue. See, *Minnesota v. United States*, 305 U.S. 382, 391 (1939), and *United States v. Clarke*, 445 U.S. 253, 254 n.1 (1980). Petitioners respectfully submit that the Court should now address the issue left open in *Minnesota* and *Clarke*, and finally resolve this longstanding troublesome issue of statutory construction. Review is especially appropriate in view of the widespread applicability of the statutes involved and their importance in the administration of federal trust responsibilities toward Indian allotted lands.

⁵The allottee Tabbytite was a respondent in *United States v. Clarke*; however, her counsel filed briefs in support of the United States position and also offered as an additional ground for consideration the argument that section 357 does not authorize condemnation of right-of-ways. See Brief for Bertha Mae Tabbytite at 6-7. This argument was not briefed by the Solicitor General. At oral argument, however, when asked whether the United States endorsed the argument of the allottee's counsel, the representative of the Solicitor General's office answered yes. See Reporters Transcript at 14 (January 15, 1980). And see, Appendix D at App. 21-22.

3. The decision of the Tenth Circuit in this case conflicts in principle with that Court's decision in Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna.

In *Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976), the State of New Mexico sought to condemn a railroad right-of-way across tribal lands of the Pueblo of Laguna. The State relied upon a 1926 federal statute empowering it to condemn tribal lands of the Pueblos for any public purpose. The Tenth Circuit held that the 1926 Act was superceded by 25 U.S.C. §§ 323-328 because to hold otherwise would result in the nullification of the Secretary's authority under that act to establish conditions to a grant as he deemed appropriate to protect the Indians' interest. The Court also reasoned that condemnation authority would strip the Pueblos of their right under 25 U.S.C. § 324 and the Indian Reorganization Act, 25 U.S.C. § 476, to consent to a right-of-way grant. *See, Plains Electric, supra* at 1380.

Plains Electric established the principle that a statute authorizing condemnation of Indian lands is inconsistent with and must yield to a statute authorizing the Secretary to grant right-of-ways and authorizing the Indians to consent to such grants. Indeed, the Tenth Circuit specifically found that 25 U.S.C. §§ 323-328 impliedly repealed a condemnation statute. *Id.* at 1379-81. However, the Court refused to extend the *Plains Electric* principle to this case solely because the lands involved are trust allotments rather than tribal lands, notwithstanding that under 25 U.S.C. §§ 323-328 the Secretary's authority is the same over both allotments and tribal lands.

The Court's basic error lay in its conclusion that current congressional policy continues to favor subjecting

trust allotments to state jurisdiction and control—a policy embodied in section 357's condemnation process. That this assimilationist policy has been repudiated by the Congress is evidenced by many recent statutes designed to encourage, facilitate and increase tribal control over allotted lands. *See, e.g.*, the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*, the Indian Country Statute of 1948, 62 Stat. 757, 18 U.S.C. §§ 1151 and 1152, and most recently the Indian Land Consolidation Act, P.L. 97-459, 96 Stat. 2515 (approved January 12, 1983). *And see* *Mattz v. Arnett*, 412 U.S.C. 481, 496 n.18 (1973), quoted in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-79 (1976); *see also* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); and Clinton, "Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze," 18 ARIZ. L. REV. 503, 507-13 (1976), reprinted in part in Getches, *Federal Indian Law* 349-52 (1979).

The 1948 Indian Right-of-Way Act, 25 U.S.C. §§ 323-328, embodies and furthers the Indian self-determination policy established by the IRA and reflected in the contemporaneous Indian Country statute of 1948, 18 U.S.C. § 1151(c) that trust allotments, including right-of-ways across them, are intended to be subject to exclusive federal and tribal jurisdiction.

Hence, the grounds upon which the Tenth Circuit attempted to distinguish *Plains Electric* from this case are illusory, and this Court should extend the principles established in *Plains Electric* to this case and hold that section 357 is displaced in part by 25 U.S.C. §§ 323-328.

4. Based upon a misinterpretation of this Court's decision in *Andrus v. Glover Construction Co.*, 446 U.S. 608 (1980), the Tenth Circuit erroneously applied the rule of statutory construction that implied repeals of a statute are not fa-

vored. Glover Construction Co., holds such rule inapplicable where a partial displacement or repeal of a statute is involved. Moreover, the Tenth Circuit's decision totally ignores other rules of statutory construction which should be applied in this case.

In reaching its decision that section 357 was not partially displaced by 25 U. S. C. §§ 323-328, the Tenth Circuit relied heavily upon the " 'cardinal rule' that the repeal of a statute by implication is not favored." *Yellowfish v. City of Stillwater*, 691 F. 2d 926, 928 (10th Cir. 1982). The panel explicitly rejected petitioners' interpretation of this Court's decision in *Andrus v. Glover Construction Co.*, 446 U. S. 608 (1980). The panel said:

Yellowfish has misconstrued *Glover Construction* and we find no merit in the argument that the partial implied repeal of a statute should be viewed with less disfavor [than the repeal of the entire statute].

Yellowfish at 928 (Appendix A at App. 5).

This Court in *Glover Construction Co.*, *supra* at 618-19, expressly declined to apply the rule disfavoring implied repeals where the issue involved a partial displacement of an earlier act by a later one. In that case, the issue was whether the Buy Indian Act of 1910, 25 U. S. C. § 47, was impliedly repealed in part by the Federal Property and Administrative Services Act of 1949, 41 U. S. C. §§ 251-260 ("the FPASA") such that the authority under the Buy Indian Act to contract with Indians for road construction without first advertising for bids was displaced by the FPASA mandate that certain contracts be advertised. In rejecting the rule that repeal by implication is not favored, the Court said:

The 1965 amendments to the FPASA did not, however, "repeal" the Buy Indian Act. With the exception of the limited class of contracts enumerated in

subsection (e), the FPASA did not in any manner displace the provisions of the Buy Indian Act.

Glover Construction Co., *supra* at 618-19.

Under petitioners' argument, 25 U. S. C. § 357 would continue to provide a means by which interests other than right-of-ways could be acquired in allotted lands. Thus since the displacement of section 357 is only partial, the rule that repeals by implication are not favored is inapplicable.

Furthermore, the Tenth Circuit simply ignored other applicable rules of statutory construction in reaching its decision in this case. Those rules urge the holding that 25 U. S. C. § 357 was displaced as to right-of-way acquisition by 25 U. S. C. §§ 323-328.

First, the rule of *expressio unis est exclusio alterius* is applicable because section 4 of the All Purposes Indian Right-of-Way Act of 1948, 25 U. S. C. § 326, expressly saves from repeal a certain class of statutes, i. e., those "empowering the Secretary of the Interior to grant rights-of-way over Indian lands. . . ." Under the foregoing rule, all statutes other than those mentioned are repealed, including 25 U. S. C. § 357, insofar as right-of-ways are involved. See, e. g., *Plains Electric Generation & Transmission Cooperative, Inc. v. Pueblo of Laguna*, 542 F.2d 1375, 1380 (10th Cir. 1976); *Glover v. Andrus Construction Co.*, *supra* at 616-17; *Tennessee Valley Authority v. Hill*, 437 U. S. 153, 188 (1978); *National Railroad Passengers Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453, 458 (1974).

Second, the rule that specific statutes control over general statutes should have been applied in this case. See, *MacEvoy v. United States*, 322 U. S. 102, 107 (1944) quoting *D. Ginsberg & Son v. Popkin*, 285 U. S. 204, 208

(1932); and *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). 25 U.S.C. §§ 323-328 is more specific than 25 U.S.C. § 357 since only right-of-ways may be acquired under the former statute, while section 357 on its face is applicable to the acquisition of all kinds of interests in lands including right-of-ways. Hence, effect must be given to the more specific statute - 25 U.S.C. §§ 323-328.

Third, the Court of Appeals ignored the rule that construction of the interrelationship between two statutes must be in favor of co-existence when they are repugnant. See e.g., *Morton v. Mancari*, *supra* at 55, *Andrus v. Glover Construction Co.*, *supra* at 618-19. Plainly, condemnation under 25 U.S.C. § 357 nullifies the ability of the Secretary of the Interior and the Indians to consent to a public purpose right-of-way across allotments. However, co-existence can be achieved by limiting 25 U.S.C. § 357 to the acquisition of interests in allotted lands other than right-of-ways.

Fourth, this Court has said that when the purpose of federal restrictions on Indian land is to give needed protection, "they should be construed in keeping with that purpose." *Smith v. McCullough*, 270 U.S. 456, 464-65 (1926); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979). Condemnation of right-of-ways under section 357 strips the Secretary and the Indians of their authority and rights under 25 U.S.C. §§ 323-328. The foregoing rule of construction thus supports a determination that section 357 has been partially displaced by 25 U.S.C. §§ 323-328 for only that construction will afford Indians the protections of 25 U.S.C. §§ 323-328 to the fullest extent possible.

5. The United States cannot advocate for the condemnation of Indian trust allotments and simultaneously act as the Indians' trustee. Therefore, the position asserted in this case by federal officials is beyond their authority and constitutes a breach of the United States' trust responsibilities.

While this case was pending on appeal in the Tenth Circuit, attorneys for the United States asserted for the first time in the case the position that 25 U.S.C. § 357 authorizes condemnation of trust allotments notwithstanding the enactment of 25 U.S.C. §§ 323-328.⁶ Consequently, petitioners Yellowfish *et al.*, filed a motion with the Court of Appeals requesting that Court to consider the adequacy of the United States' representation of its Indian beneficiaries. The Court of Appeals concluded that the United States' position was justified. The Court said:

when the United States merely supports and carries out the clear intent of congressional policy as manifested in section 357, it does not breach its trust and it is not required to make a showing that its position is in the Indians' best interest.

Yellowfish v. City of Stillwater, 691 F.2d 926, 931 (10th Cir. 1982) (Appendix A at App. 11).

The Court of Appeals failed to comprehend the statutory basis of the United States' authority and duty as trustee in this case. In particular, the Court of Appeals erred in relying upon 25 U.S.C. § 357 as authority for the United States' action in this case.

The authority of federal officials to act in behalf of the United States as trustee for American Indians is derived from federal statutes creating trust duties in such

⁶See Memorandum of United States in Opposition to the Petition and to Reversal (filed July 27, 1981) and Brief for the United States, Appellee, (filed September 30, 1982), *Yellowfish v. City of Stillwater*, 691 F.2d 926 (10th Cir. 1982).

officials and the scope of that authority is ascertained from the legislative intent and, in the absence of any express indications, from equitable principles of trust. *See, e. g., United States v. Mitchell*, 445 U. S. 535 (1980); *Seminole Nation v. United States*, 316 U. S. 286, 297 (1942); and II A. Scott, *The Law on Trusts* § 164 (3d ed. 1967).

25 U. S. C. § 357 does not create any trust relationship between federal officials and Indians. No trust responsibilities are imposed by that statute on federal officials. Indeed, that statute operates in this case to nullify the ability of federal officials to carry out their trust duties under both the General Allotment Act and 25 U. S. C. §§ 323-328.⁷

In *Minnesota v. United States*, 305 U. S. 382 (1939) this Court held that the United States is an indispensable party in proceedings under section 357 to condemn trust allotments. However, the interest of the United States in such proceedings is not in implementing the condemnation of Indian lands, but in ensuring during the pendency of such proceedings that the restraints imposed on such lands by other federal statutes are enforced. *Id.* at 387-88.

⁷The allotted lands involved in this case are held in trust pursuant to the General Allotment Act of 1887, 25 U. S. C. § 331 et seq. See *Yellowfish*, *supra* at 927 (Appendix A at App. 1). The General Allotment Act created a limited trust relationship between federal officials and Indians. It empowers federal officials to hold the land in trust for the purposes of preventing alienation of the land and ensuring immunity of the land from state taxation. *United States v. Mitchell*, *supra* at 544. Subsequently, the enactment of 25 U. S. C. §§ 323-328 created trust duties on the part of the Secretary of the Interior by authorizing him to grant right-of-ways across allotments subject to conditions imposed by the Act and by the Secretary's regulations, 25 C. F. R. Part 169. See, *Mitchell v. United States*, 664 F. 2d 265, 269 (Ct. Cl. 1981), petition for cert. granted 73 L. Ed. 2d 1312 (U. S. June 7, 1982) (No. 81-1748).

Obviously, section 357 is the antithesis of a statute imposing restraints upon the alienation of allotted land, and therefore the antithesis of a statute creating a trust relationship. This Court has recently acknowledged the inherent antagonism between the power to condemn and the duties of a trustee. In *United States v. Sioux Nation of Indians*, 448 U.S. 371, 408 (1980), this Court held that the power of condemnation is the tool of a sovereign, not the tool of a trustee. Consequently, in its dealing with Indian lands, the United States cannot exercise its sovereign power of eminent domain over Indian lands and simultaneously act as a trustee for the Indians.

Accordingly, the position taken in this case by federal officials acting in behalf of the United States as trustee for the Indians is not authorized by 25 U.S.C. § 357 and in fact operates ultimately to defeat trust duties imposed by other federal statutes.⁸ In essence, the United States in its capacity as trustee for the Indians was not represented in this case.

⁸Federal officials in this case also asserted in justification of their legal position that the position was in the best interests of the Indians. The Court of Appeals found that generally right-of-way condemnation is in the Indians' best interests. See, *Yellowfish* at 931 (Appendix A at App. 11-12). However, the common law rule of trusts that the trustee must administer the trust solely in the interest of the beneficiaries is misapplied by the Court of Appeals. That rule is applicable only when the trustee is authorized by the terms of the trust to take action. It is a guide to determine the parameters of the trustee's authority under the terms of the trust. It cannot, however, be relied upon to create a trust relationship between the United States and Indians. Such a relationship must be statutorily based. In this case, the United States does not have authority to condemn under section 357. Indeed, as discussed above, section 357 does not establish a trust relationship at all. Since section 357 does not confer any trust duties on the United States, the "best interests" rule is simply inapplicable to justify the legal position taken by the United States purportedly as the Indians' trustee.

Moreover, the legal position taken by the federal officials involved in this case constituted a breach of trust because the principles of trust applicable to this case required the United States to resist Stillwater's claim to condemnation authority over the Indians' lands, and to support the Indian petitioners' defense.

Under the General Allotment Act, 25 U. S. C. § 331 et seq., and 25 U. S. C. §§ 323-328, federal officials have the duty to prevent alienation of trust allotments without the consent of the United States or the Indians. Furthermore, as a trustee charged with the preservation of trust allotments, the United States is charged under common law principles of trust with the duty to resist claims against the trust estate, when it is reasonable to do so under the circumstances. See, II A. Scott, *The Law on Trusts* § 178 (3d ed. 1967), *Restatement (Second) of Trusts*, § 178 at 385 (1959).

In this case, the state of the law in the Tenth Circuit's jurisdiction as to the issue of whether section 357 was partially repealed by 25 U. S. C. §§ 323-328 was unsettled for two reasons. First, the Tenth Circuit had not yet ruled on the interrelationship between those two statutes. Second, and most significantly, in *Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976), the Tenth Circuit held that 25 U. S. C. §§ 323-328 superceded a condemnation statute applicable to tribal trust lands. It would have been eminently reasonable for the United States, in reliance on the *Plains Electric* decision, to resist the claim of Stillwater that it is authorized under section 357 to

condemn a right-of-way over trust allotments.⁹ Since the United States did not resist Stillwater's claim and instead asserted a legal position in support of Stillwater's condemnation authority, the United States committed a gross breach of its trust responsibilities to the Indians in this case.¹⁰

Since the officials representing the United States as trustee for the Indian allottees in this case acted outside the scope of their authority and failed to act in accordance with their trust duty, the United States was in effect absent as a party trustee in this case. Therefore this action should be dismissed for lack of an indispensable party. *Minnesota v. United States, supra.*

CONCLUSION

For the reasons stated, the Court is respectfully requested to grant a writ of certiorari.

⁹The impact of the *Plains Electric* decision upon the jurisdictional issue in this case is reflected in the fact that the district court certified its interlocutory decision on the issue for immediate appeal pursuant to 28 U. S. C. 1292(b), see Appendix C at App. 18, and in the fact that the Court of Appeals accepted the case for review.

¹⁰If the United States wished to take a legal position in favor of condemnation of trust allotments for right-of-ways, it should not have done so under the guise of the Indians' trustee. Rather, it should have participated in another capacity, perhaps as an amicus or as an intervenor depending upon the nature and importance of the interest it might be able to demonstrate. Any resulting conflict of interest problem could then have been directly addressed and resolved.

Respectfully submitted,

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February, 1983

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APPENDIX A

Opinion of the Court of Appeals

Cornelia DeRoin YELLOWFISH, Stella DeRoin, Willene DeRoin, Clarice DeRoin Rickman, Wilma DeRoin Guoladdle, Pearl H. DeRoin McKinney, Lillian Carson Morgan, Lena Shadlow Black, Louis (Lewis) Peters,

Plaintiffs-Appellants,

vs.

CITY OF STILLWATER,

Defendant-Appellee.

No. 81-1948

United States Court of Appeals, Tenth Circuit

April 28, 1982

Rehearing Denied Nov. 12, 1982

Before HOLLOWAY, DOYLE and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

The City of Stillwater filed a petition in federal district court to condemn easements over the trust allotments of the nine Indian appellants (hereinafter collectively referred to as "Yellowfish") and other Indians in Noble County, Oklahoma, for the purpose of constructing a municipal water supply pipeline. The United States was joined as a defendant because the allotments under condemnation were originally issued under the General Allotment Act of 1887, 25 U. S. C. § 331 *et seq.*, with legal title to the land retained by the United States as trustee.

Jurisdiction is predicated on section 3 of the Act of March 3, 1901, 25 U. S. C. § 357 (section 357), which pro-

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vides that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned. . . ." Yellowfish contends that section 357 was impliedly repealed in part by the Act of February 5, 1948, 25 U. S. C. §§ 323-328 (1948 Act),¹ which empowers the Secretary of the Interior to

1. The 1948 Act provides in pertinent part:

"The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians."

25 U. S. C. § 323

"No grant of a right-of-way over and across any lands belonging to a tribe organized [certain] sections . . . of this title . . . shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent and also finds that the grant will cause no substantial injury to the land or any owner thereof."

25 U. S. C. § 324.

(Continued on next page)

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grant rights-of-way with the consent of Indian allottees.² If this were so, the district court would not have subject matter jurisdiction under section 357 to proceed with the proposed condemnation in this case. However, we disagree with Yellowfish and affirm the trial court holding that federal courts have jurisdiction under section 357 to condemn rights-of-way over allotted Indian land without secretarial or Indian consent.

I.

Background

After the condemnation petition was filed, the Bureau of Indian Affairs sent letters to each of the 110 allottee defendants informing them they could have the United States Attorney represent them in the condemnation action. The nine Indian appellants decided instead to retain private counsel. The trial court concluded that section 357 was not repealed by implication and refused to dismiss the case or stay ongoing proceedings. The court also refused to prohibit the City of Stillwater from taking

(Continued from previous page)

"No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior."

25 U. S. C. § 325.

2. Under certain limited circumstances, the Secretary may authorize a right-of-way without Indian consent. See 25 U. S. C. § 323 [sic] *supra* n. 1.

possession of the condemned allotments in order to construct the water pipeline.

Yellowfish filed a petition for permission to take an interlocutory appeal from the trial court's order and a motion for a stay pending appeal. We granted permission for the interlocutory appeal but denied the stay pending appeal. The two issues on appeal are (1) whether federal court jurisdiction is absent because condemnation of rights-of-way under section 357 was impliedly repealed by the 1948 Act, and (2) whether the United States in its capacity as a trustee is required to disclose more specifically its grounds for asserting that right-of-way condemnations are in the best interest of Indians.

II.

Federal Court Jurisdiction and Implied Repeal of Section 357

It is a "cardinal rule" that the repeal of a statute by implication is not favored. *Morton v. Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 2482, 41 L. Ed. 2d 290 (1974); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 193, 89 S. Ct. 354, 358, 21 L. Ed. 2d 334 (1968). The implied repeal of a statute of longstanding use may be viewed with even greater disfavor. *See Mancari*, 417 U.S. at 549, 94 S. Ct. at 2482. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Andrus v. Glover Construction Co.*, 446 U.S. 608, 618-19,

100 S. Ct. 1905, 1911, 64 L. Ed. 2d 548 (1980) (quoting *Mancari*, 417 U. S. at 551, 94 S. Ct. at 2483). See *Steed v. Roundy*, 342 F. 2d 159, 161 (10th Cir. 1965).

Based on its interpretation of *Glover Construction*, 446 U. S. at 618-19, 100 S. Ct. at 1911, Yellowfish contends that when a partial repeal is advocated the rule that implied repeals are not favored does not apply. Yellowfish has misconstrued *Glover Construction* and we find no merit in the argument that the partial implied repeal of a statute should be viewed with less disfavor. We also reject Yellowfish's contention that the presumption against implied repeal is not applicable when various Indian statutes are involved. See *Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna*, 542 F. 2d 1375, 1376-1381 (10th Cir. 1976).

There are two well accepted categories of repeal by implication: "(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act." *Plains Electric*, 542 F. 2d at 1376 (quoting *Posadas v. National City Bank*, 296 U. S. 497, 503, 56 S. Ct. 349, 352, 80 L. Ed. 351 (1936)). In either situation, legislative history and congressional intent are important factors. *Plains Electric*, 542 F. 2d at 1376, but the intent of the legislature must be "clear and manifest" to uphold an implied repeal. *Posadas*, 296 U. S. at 503, 56 S. Ct. at 352.

Yellowfish contends our reasoning in *Plains Electric* dictates that we should hold section 357 partially repealed

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by implication. In that case, we held condemnation under a 1926 Act³ impermissible because that Act was replaced and impliedly repealed by a 1928 Act⁴ and by the 1948 Act, both of which require the Secretary's consent to right-of-way grants. Yellowfish asserts that section 357 is "strikingly similar in effect" to the 1926 Act and therefore was impliedly repealed as well.

Although the 1926 Act and section 357 have similarities, the important difference is that section 357 authorizes condemnation of *allotted* land, while the 1926 Act allowed condemnation of lands *communally* owned by the Pueblo Indians.⁵ See *Plains Electric*, 542 F. 2d at 1377. The different treatment accorded by Congress to Indian tribal land and land allotted in severalty to individual Indians has been explained by several courts. See *United States v. Oklahoma Gas & Electric Co.*, 318 U. S. 206, 211-215, 63 S. Ct. 534, 536-38, 87 L. Ed. 716 (1943); *United States v. 10.69 Acres of Land*, 425 F. 2d 317, 319 (9th Cir. 1970); *United States v. Oklahoma Gas & Electric Co.*, 127 F. 2d 349, 353-54 (10th Cir. 1942); *aff'd*, 318 U. S. 206, 63 S. Ct. 534, 87 L. Ed. 716 (1943). While *Plains Electric* supports the proposition that Congress distinguished between tribal and allotted lands and did not intend to permit condemnation of *tribal* or communally owned land, it

3. Act of May 10, 1926, 44 Stat. 498 (1926 Act).

4. Act of April 2, 1928, 25 U. S. C. 322 (1928 Act).

5. Moreover, the 1928 Act's legislative history indicates that Congress intended it to repeal and substitute for the 1926 statute authorizing condemnation. *Plains Electric*, 542 F. 2d at 1377-79. We have found no legislative history for the 1948 Act suggesting a similar congressional intent.

is silent on the subject of allotted lands. Consequently, that case does not compel the conclusion that Congress also partially repealed section 357 by implication.

Three circuits have recognized that section 357 provides an alternative method for acquiring allotted Indian land. In *United States v. Minnesota*, 113 F. 2d 770 (8th Cir. 1940), the Eighth Circuit held that condemnation under section 357, section 3 of the 1901 Act, was not modified by the requirement of secretarial consent for rights-of-way under 25 U. S. C. § 311, section 4 of the 1901 Act. In giving each provision in the statute full effect, the Eighth Circuit explained why Congress could reasonably intend both the consent of the Secretary and the condemnation power without consent to apply to allotted land as alternative methods of right-of-way acquisition:

“The land involved, being allotted in severalty, is no longer a part of the reservation, nor is it tribal land. The virtual fee is in the allottee, with certain restrictions on the right of alienation. This restriction, consistent with the Government’s paternal policy toward the Indians, was doubtless to protect the Indian from being overreached in the sale of his land. The statutes seem definitely to offer two methods of procedure for the acquisition of a right of way for public highway. Section 3, 25 U. S. C. A. § 357, authorizes the maintenance of condemnation proceedings. Ordinarily, the owner of a fee title to real estate may grant a right of way over his land, but although the allottee is vested with fee title, his right of alienation is restricted, and hence, it would not be possible to secure a right of way from such allottee by purchase, however desirable it might be, and however advantageous to the allottee. By Section 4 of the Act, 25 U. S. C. A. § 311, the Secretary of the Interior is authorized to grant permission for the opening and establishment of a public highway through lands al-

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lotted in severalty. Thus, it was made possible to acquire such a right of way by either of two methods, the Government having consented to each of these methods. So considered, each of these sections is an effective and reasonable provision in the procedure for the acquisition of a right of way, neither dependent upon the other."

113 F. 2d at 773.

This court has similarly rejected the implied repeal argument. In *Transok Pipeline Co. v. Darks*, 565 F. 2d 1150, 1153 (10th Cir. 1977), *cert. denied*, 435 U. S. 1006, 98 S. Ct. 1876, 56 L. Ed. 2d 388 (1978), we noted that although the Secretary's approval was required for rights-of way under 25 U. S. C. § 323 (the 1948 Act) and various other provisions, his approval was not necessary for condemnation under section 357. *Accord*, *Nicodemus v. Washington Power Co.*, 264 F.2d 614, 617-18 (9th Cir. 1959). We explained that "[u]ndoubtedly Congress considered the safeguards available in federal judicial proceedings to be sufficient so that the permission of the Secretary was not required." 545 F.2d 1153. We disagree with Yellowfish's contention that *Minnesota*, *Nicodemus*, and *Transok Pipeline*⁶ were wrongly decided.

Yellowfish also argues that condemnation of rights-of-way under section 357 conflicts with current congress-

6. We note that a decision of this court may not be overturned by a panel of three judges but must instead be considered by the court en banc. However, this poses no problem in the present case because we agree with the conclusion in *Transok Pipeline* that condemnation of allotted lands may proceed under section 357 without the Secretary's consent.

sional policy embodied in other statutes. In the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA), and the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §§ 501 *et seq.* (OIWA), Congress substantially changed prior Indian policy. For example, section 1 of the IRA, *id.* § 461, prohibited further allotment of any Indian reservation land. Nevertheless, existing allotments were continued and remain in effect. Moreover, allotments are still made to Indians not residing on reservations. *See* 25 U.S.C. § 334.

Federal policy toward Indians is often contained in several general laws, special acts, treaties, and executive orders, and these must be construed *in pari materia* in ascertaining congressional intent. *See Stevens v. Commissioner*, 452 F.2d 741, 744, 745 n.8 (9th Cir. 1971). "And, although the 'rule by which legal ambiguities are resolved to the benefit of the Indians' is to be given 'the broadest possible scope,' '[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent.'" *Glover Construction*, 446 U.S. at 619, 100 S.Ct. at 1911 (quoting *De Coteau v. District County Court*, 420 U.S. 425, 447, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300 (1975)). The test is the intent of Congress, not whether the statute is general or special.

We find it persuasive that in 1976 Congress still viewed section 357 as a valid condemnation statute. In that year it passed a statute that repealed the 1926 Act at issue in *Plains Electric*. Act of September 17, 1976, 90 Stat. 1275 (1976 Act). At the same time, the 1976 Act amended the 1928 Act *to extend section 357* to the Pueblo Indians of New Mexico and their lands. 90 Stat. 1275.

In *Oklahoma Gas & Electric*, 318 U. S. 206, 63 S. Ct. 534, 87 L. Ed. 716, the Supreme Court considered whether secretarial permission granted to a state under 25 U. S. C. § 311 to build a highway over allotted Indian land included the right of the state to permit the construction of a rural electric line along the highway. In concluding that it did, the Court said:

“Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. *We believe that if Congress had intended this it would have made its meaning clear.*”

Id. at 211, 63 S. Ct. at 536 (emphasis added). This reasoning applies equally well to the present situation where condemnation of rights-of-way on allotted land interspersed with non-Indian land is needed to effectively carry out public purposes such as construction of water pipelines.

We conclude that the intent of Congress to partially repeal section 357 by implication is not “clear and manifest,” and that the two statutes are not in irreconcilable conflict. In fact, section 357 and the 1948 Act can be harmonized. The two statutes provide alternative methods for a state-authorized condemnor to obtain a right-of-way over *allotted* lands. The potential condemnor may proceed under section 357 to condemn the right-of-way, or he may apply to the Secretary of the Interior for permission to purchase the right-of-way under the 1948 Act, if the allottees’ consent is obtained.

The long history of condemnation of rights-of-way over allotted lands without Secretarial consent, the various cases upholding the practice, and the disfavor with

which courts view repeal by implication support this conclusion. We have considered Yellowfish's other arguments that section 357 has been partially repealed and find them to be without merit. Accordingly, the trial court has jurisdiction under section 357 over Stillwater's condemnation of the water pipeline.

III.

United States as Fiduciary

Yellowfish questions whether the legal position assumed by the United States in support of Stillwater's power to condemn trust allotments is a reasonable and permissible exercise of judgment consistent with its duties as trustee to the Indians. Yellowfish argues that the United States should be required to disclose more specifically the grounds for its position that condemnation of rights-of-way is in the best interest of its Indian beneficiaries. Under the facts of this case, we disagree. When the United States merely supports and carries out the clear intent of congressional policy as manifested in section 357, it does not breach its trust and it is not required to make a showing that its position is in the Indians' best interest. *See Nicodemus*, 264 F.2d at 618. As we previously stated, Congress has already weighed the Indians' interest and "[u]ndoubtedly Congress considered the safeguards available in federal judicial proceedings [under section 357] to be sufficient." *Transok Pipeline*, 565 F.2d at 1153.

Even if the Government needed to demonstrate why right-of-way condemnations are in the best interest of Indians, we are persuaded that the Government adequately

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made such a showing in oral argument. If condemnation is not permitted, a single allottee could prevent the grant of a right-of-way over allotted lands for necessary roads or water and power lines. Moreover, Indian allottees benefit as much from public projects as do those non-Indian property owners whose land is interspersed with the allottees' land.

AFFIRMED.

APPENDIX B

**Order of the Court of Appeals Denying the
Petition for Rehearing and the Suggestion
for Rehearing In Banc**

SEPTEMBER TERM — November 12, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

No. 81-1948

CORNELIA DeROIN YELLOWFISH, STELLA DeROIN ROWE, WILLENE DeROIN ROSS, CLARICE DeROIN RICKMAN, WILMA DeROIN GUOLADDLE, PEARL H. DeROIN McKINNEY, LILLIAN CARSON MORGAN, LENA SHADLOW BLACK, LOUIS (LEWIS) PETERS,

Petitioners,

vs.

THE CITY OF STILLWATER,

Respondent.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service

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on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Howard K. Phillips, Clerk

**By /s/ Robert L. Hoecker
Chief Deputy Clerk**

APPENDIX C

Opinion and Order of the District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

No. CIV-81-674-D

**THE CITY OF STILLWATER, OKLAHOMA,
A Municipal Corporation,** *Plaintiff,*

vs.

**AN EASEMENT AND RIGHT-OF-WAY FOR WATER
PIPELINE PURPOSES ACROSS VARIOUS TRACTS
OF LAND IN NOBLE COUNTY, OKLAHOMA AS IN-
DICATED, et al.,**

Defendants.

(Filed July 8, 1981)

O R D E R

This is a condemnation action brought by Plaintiff to obtain easements and rights-of-way in various tracts of land located in Noble County, Oklahoma, for use in connection with a municipal water supply pipeline running from Kaw Reservoir in Osage County, Oklahoma, to Stillwater, Oklahoma. Presently before the Court in this matter is a Motion to Dismiss for Lack of Subject Matter Jurisdiction and a Motion entitled "Motion to Postpone Appointment of Commissioners, or in the Alternative to Prohibit Plaintiff from Entering into Possession, Pending Final Resolution of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction" filed by Defendants Pearl H. DeRoin McKinney, Lillian Carson Morgan, Lena Shadlow Black, Stella DeRoin Rowe, Willene DeRoin Ross,

Clarice DeRoin Rickman, Wilma DeRoin Guoladdle, Cornelia DeRoin Yellowfish and Louis (Lewis) Peters (hereinafter referred to collectively as "Movants"), all of whom are Indian allottees. On June 30, 1981, the Court conducted a hearing on Movants' Motion to Dismiss at the conclusion of which the Court orally overruled said Motion and indicated that the instant Order would be entered formally setting out the Court's ruling.

In their Motion to Dismiss, Movants contend that this action should be dismissed for lack of subject matter jurisdiction on the grounds that the second paragraph of § 3 of the Act of March 3, 1901, ch. 832, § 3, 31 Stat. 1084 (codified at 25 U.S.C. § 357) has been partially repealed by implication by the Act of February 5, 1948, ch. 45, §§ 1-6, 62 Stat. 17-18 (codified at 25 U.S.C. §§ 323-328), and therefore does not empower the Plaintiff to *condemn* a water pipeline right-of-way across Movants' allotments.

25 U.S.C. § 357 provides as follows:

"Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Turning to the Act of February 5, 1948, *supra* (hereinafter "1948 Act"), 25 U.S.C. § 323 empowers the Secretary of the Interior to *grant* rights-of-way for all purposes, subject to such conditions as he may impose, across any Indian lands held in trust. 25 U.S.C. § 324 requires "the consent of the proper tribal officials" before a right-of-way may be *granted* over and across any lands belonging to Indian tribes organized under certain statutes. § 324

provides with regard to trust lands allotted to individuals as follows:

Rights-of-way over and across lands of individual Indians may be *granted* without the consent of the individual owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the *grant*; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the *grant*; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the *grant* will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the *grant* will cause no substantial injury to the land or any owner thereof. (Emphasis added.)

25 U.S.C. § 325 requires that no *grant* of a right-of-way be made without "the payment of such compensation as the Secretary of the Interior shall determine to be just."

25 U.S.C. § 326 provides that nothing in the 1948 Act shall "amend or repeal" the Federal Water Power Act "nor shall any existing statutory authority empowering the Secretary of the Interior to *grant* rights-of-way over Indian lands be repealed." 25 U.S.C. § 327 authorizes the *grant* of rights-of-way under the provisions of the 1948 Act for the use of the United States upon application by the federal department or agency having jurisdiction over the activity for which the right-of-way is to be used. 25 U.S.C. § 328 empowers the Secretary of the Interior to prescribe any necessary regulations for the purpose of implementing the 1948 Act.

In view of the foregoing, it is apparent that Movants' contention that the 1948 Act repealed 25 U. S. C. § 357 by implication insofar as § 357 applies to the acquisition of rights-of-way across Indian allotments is without merit. Rather, § 357 and the 1948 Act clearly serve different purposes and provide separate and independent means for obtaining rights-of-way across Indian lands. In this connection, the express language of § 357 indicates that said section applies in a *condemnation* situation while the provisions of the 1948 Act apply only to *grants* of rights-of-way in Indian lands. Thus, approval of the Secretary of Interior or the affected Indian tribe or individual Indian land owners is not required as a prerequisite to condemnation under § 357. See *Transok Pipeline Co. v. Darks*, 565 F. 2d 1150, 1152 (Tenth Cir. 1977), *cert. denied*, 435 U. S. 1006, 98 S. Ct. 1876, 56 L. Ed. 2d 388 (1978); *see also Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Lagune*, 542 F. 2d 1375, 1381-1382 (Tenth Cir. 1976) (Seth, J., dissenting). Accordingly, the Court determines that § 357 and not the 1948 Act applies in the instant proceeding and therefore Movants' Motion to Dismiss should be overruled.

The Court further determines that this ruling involves a controlling question of law as to which there is substantial ground for difference of opinion that an immediate appeal from this Order may materially advance the ultimate termination of this litigation. Therefore, Movants are hereby granted permission to take an interlocutory appeal from this ruling, but the Court declines to stay proceedings in this matter pending resolution of this appeal. See 28 U. S. C. § 1292(b).

In view of the fact that the Court has now appointed commissioners in this case and in light of the disposition made above in connection with Movants' Motion to Dismiss, the Court determines that Movants' "Motion to Postpone Appointment of Commissioners, or in the Alternative to Prohibit Plaintiff from Entering into Possession, Pending Final Resolution of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction" should be stricken as moot as to the requested postponement and overruled as to a prohibition from entering into possession when Plaintiff is in position to request the same.

IT IS SO ORDERED this 8th day of July, 1981.

/s/ Fred Daugherty
United States District Judge

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APPENDIX D

Memorandum of Interior Solicitor

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D. C. 20240

Nov. 28, 1980

Memorandum

To: Assistant Secretary, Land and Water

From: Solicitor /s/ Clyde O. Martz

Subject: Condemnation of Alaska Native Allotments for
Rights-of-Way

This responds to the request of the Northwest Alaskan Pipeline Company, transmitted through you, for a legal memorandum on the following question: May Alaska Native allotments be condemned for rights-of-way?

This issue was addressed by the Associate Solicitor for Indian Affairs in an opinion dated April 28, 1967. His view was that Alaska Native allotments could be condemned under the authority of section 3 of the Act of March 3, 1901 (25 U. S. C. § 357). Section 357 provides:

"Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."¹

¹Twice the United States Supreme Court has ruled that condemnations pursuant to section 357 must be filed in federal court and that the United States is an indispensable party. *United States v. Clarke*, 445 U. S. 253 (1980); *Minnesota v. United States*, 305 U. S. 382 (1939).

I have reviewed the 1967 opinion, and I concur in its view that section 357 applies equally to Alaska Native allotments and to allotments made pursuant to the General Allotment Act (25 U. S. C. §§ 331 *et seq.*).

However, a salient issue not addressed by the 1967 opinion has recently arisen in several such condemnation actions. That issue is whether the Act of February 5, 1948 (25 U. S. C. §§ 323 *et seq.*), which provides the Secretary with the authority to grant rights-of-way for any public purpose across trust or restricted Indian lands, impliedly superseded or repealed the authority to condemn rights-of-way under section 357. The argument is that Congress, when it enacted the 1948 Act, intended to give Indians greater control over the disposition of their lands, and to that end provided in section 2 of the Act (25 U. S. C. § 324) that the Secretary could not grant rights-of-way under the Act without the consent of the affected allottees (except in specific, limited circumstances) or without the consent of tribes organized under the Indian Reorganization Act (25 U. S. C. §§ 461 *et seq.*). To give continuing authority under section 357 to condemn allotted Indian lands is said to defeat that objective. *Cf. Plains Electric Generation and Transmission Coop. v. Pueblo of Laguna*, 542 F. 2d 1375, 1380 (10th Cir. 1976). Supporters of this argument also note that the savings clause in the 1948 Act (25 U. S. C. § 326) preserves any existing authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands, but makes no reference to the general condemnation authority of section 357.

This argument was made last January before the Supreme Court in *United States v. Clarke*, 445 U. S. 253 (1980), by

counsel for the allottee in that case. The United States' brief did not address that issue; nor did the Court's opinion, (see 445 U. S. at 254, note 1). But, when asked whether the United States endorsed the position of the allottee's counsel, the representative of the Office of the Solicitor General answered in the affirmative. We understand this to be the position of the Deputy Solicitor General, though to our knowledge, the Department of Justice has not sought to dismiss any condemnation proceeding pursuant to section 357 on this ground.

It must be said that the weight of authority runs against this argument. Indeed, the U. S. Court of Appeals for the Ninth Circuit long ago ruled that the 1948 Act and section 357 are not inherently inconsistent but that they provide two independent methods of procedure to acquire a right-of-way. *Nicodemus v. Washington Water Power Co.*, 264 F. 2d 614, 618 (1959); see also *Transok Pipeline Co. v. Darks*, 565 F. 2d 1150, 1153 (10th Cir. 1977). That this remains the rule of the Ninth Circuit seems clear from the recent decision of the U. S. District Court in *Southern California Edison Co. v. 33.49 Acres of Land*, No. CV-3709-RJK (C.D. Cal.), entered September 19, 1980. We are told that the district judge has certified the issue for appeal.

The issue is also currently before federal courts in Nebraska, *Nebraska Public Power Dist. v. 100.95 Acres of Land*, Docket No. 79-0411 (D. Neb.), and in New Mexico, *Mapco v. Toledo*, Civil No. 80-507-M (D. N. M.). Thus, we may soon see whether the argument that the 1948 Act supersedes the condemnation authority of section 357 for rights-of-way gains any support in the courts. It has been the consistent practice of the Interior Department not to oppose the condemnation of rights-of-way over allotted

lands on this ground. Indeed, as early as 1923 the Department was of the view that section 357 had not been repealed or superseded by subsequent acts of Congress providing the Secretary with authority to grant rights-of-way across allotted Indian lands. 49 L. D. 396. Whether this position should be reconsidered in light of the 1948 Act will turn largely on the court proceedings in the current cases.

We have limited this memorandum to a discussion of the application of 25 U. S. C. § 357 to Alaska Native allotments because of the brief time period within which we were required to respond and because of an abundance of judicial precedent interpreting that statute.

Clyde O. Martz

cc: Deputy Assistant Secretary, Indian Affairs
